No. 4096

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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LEE HING, also known as LEE GOOD MING,
*Appellant,*

vs.

JOHN D. NAGLE, as Commissioner of Immigration, Port of San Francisco,
*Appellee.*

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## BRIEF FOR APPELLANT.

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JOSEPH P. FALLON,
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## BRIEF FOR APPELLANT.

### Statement of the Case.

This is an appeal from the order and judgment of the lower court sustaining the demurrer interposed and denying a petition for a writ of habeas corpus. Lee Soo applied to enter the United States as a citizen thereof, he claiming to be the foreign-born son of Lee Hing, also known as Lee Good Ming, appellant herein, a native born citizen of the United States. His claim was based under Section 1993 of the Revised Statutes. He was denied admission by a board of special inquiry from whose decision an appeal was taken to the Secretary of

Labor at Washington, D. C., where the decision of said board was affirmed and he was ordered deported to China.

A petition for a writ of habeas Corpus was thereupon filed in the court below for his release from custody of the immigration authorities, with the result as stated in the opening paragraph hereof.

The history of the case has been so admirably and succinctly set forth in the brief of attorney G. W. Hott to be found in Exhibit "A", pages 37 to 42 inclusive, that I quote said brief at length herein:

> "The applicant, Lee Soo, was born in China July 9, 1905. He applied for admission to the United States at San Francisco Oct. 10, 1922, as the son of Lee Hing, alias Lee Good Ming, a native born citizen of the United States.
>
> The relationship is not disputed but the applicant was excluded by a board of special inquiry on the ground that the citizenship of the father was not established.
>
> In our view of the case the only question involved is a point of law which has been judicially settled. It is conceded and it also appears from the official records that the father's status was adjudicated by the department in 1906 on his return from a trip to China; in 1912, when a return certificate was issued to him and in 1916 when a certificate of identity was issued to him as a native born citizen of the United States.
>
> It does not appear necessary, in our view of the case, to enter into a detailed discussion of all the facts and evidence, but in order to

clearly understand the situation a brief review of the history of the case is essential.

The father of this applicant claims to have been born in San Francisco in 1876 and that he made three trips to China, (1st) departing March 26, 1882, with his father and other members of the family and returning Nov. 10, 1898, as #162 on the Belgic, (2nd) departing on the Mongolia Oct. 13, 1904, and returning on the Manchuria May 31, 1906, (3d) departing through the port of Seattle Dec. 16, 1912, and returning on the Mongolia June 1, 1915, being admitted as a native of the United States on all three trips.

It is conceded that the father of this applicant is the person who made the 1904-1906 and the 1912-1915 trips, the 1882-1898 trip only being in doubt.

In 1912 another Chinaman came forward and claimed that he was the Lee Hing who made the trip to China in 1882-1898 (claimed as the first trip for the father of this applicant) and on the presentation of certain records and a very brief examination, was granted a return certificate, with which he departed in that year and returned in 1913. He has made no further trips to China. For the reasons hereafter set forth, it seems clear to us that the latter claimant to the 1899 record is an imposter and that he had unlawful possession of the records which he presented. He waited fourteen years before claiming this record.

On the other hand the father of this applicant made a second trip to China about five and one-half years after his last arrival, claiming the 1899 record as his own. This trip was made at a time when there could not be any great difficulty in determining definitely, by comparing him

and his photograph with the photograph in the 1899 record; whether he was the proper claimant to the said 1899 record. He departed in 1904 on the affidavits of identity as was customary at that time. In his said affidavit dated Oct. 5, 1904, he sets forth, in substance, that he was born in San Francisco in 1876 and was taken to China by his father Lee Tuck Ng and his mother Mah Shee in 1882, where he remained until Nov. 10, 1898, returning on the Belgic as #162 and was landed as a native March 2, 1899, by John P. Jackson, Collector of the port, and that there is now on file in the "Chinese Bureau" of this port (San Francisco) all affidavits and proofs and decision of Collector Jackson ordering his landing March 2, 1899; that he is now going on a temporary visit to China and makes this affidavit in duplicate and appends thereto the affidavit of Henry C. Dibble, who was his attorney and attended to his case in 1898-1899. His affidavit was signed by him in English and attached thereto is his photograph, which is conceded to be the photograph of the father of this applicant.

There is also annexed to the affidavit just mentioned the affidavit of Henry C. Dibble the attorney above mentioned, executed before the same notary and bearing the same date. Attorney Dibble in this affidavit states:

'That he was the attorney who attended the case of Lee Hing #162 ex ss Belgic Nov. 1898; that some considerable time after the steamer arrived affiant was employed by Ching Goy Lang, a well known merchant and property owner in Chinatown whose wife, Lee See Moy, is the sister, as the records show, of said Lee Hing, whose photograph is annexed to the preceding affidavit of said Lee Hing.

Affiant further states that said Lee Hing was landed by the Collector, James P. Jackson, March 2, 1899, as a native; and affiant now identifies said Lee Hing whose photograph is annexed to the preceding affidavit, as aforesaid, as the same person who was so landed by Collector Jackson as a native March 2, 1899.'

As stated above, the two affidavits referred to were executed on the same day and before the same notary public, and Attorney Dibble positively identified the father of this applicant as the person he represented and who was landed in 1899. It is not disputed that the father of this applicant is the same person who departed in 1904 on the above mentioned affidavits.

The father of this applicant returned from the said 1904 trip in May 1906, and his case was assigned to inspector Gassaway for investigation, who reported: 'I have compared the enclosed photograph with that on file in his previous landing and find them to be one and the same person'. This report is attached to the departing affidavit of 1904 which contained the conceded photograph of the father of this applicant. The photograph 'on file in his previous landing' must have been the photograph attached to the 1898-1899 record, as above set forth, as this was his first and *only* 'previous landing'. Thus the father of this applicant was positively identified by his attorney prior to his departure in 1904, and by a Chinese inspector on his return from that trip in 1906, as the same person who was landed in 1899.

After his return in 1906 he spent several years in and around San Francisco and about 1910 he went to Boston where he remained until Dec. 1912, when he departed for China after

having his status preinvestigated, by way of Seattle.

During the time the father of this applicant was residing at Boston a second alleged Lee Hing appeared on the scene and on April 1, 1912, filed an application for a return certificate. He was briefly examined on the following day, presented what purported to be the 1899 landing record claimed by the father of this applicant, and eight days thereafter, April 10, 1912, departed for China, with a return certificate. He was represented in this proceeding by an attorney of San Francisco who was later indicted for wholesale fraud in Chinese cases. The inspector who investigated the case of this second Lee Hing says he is the same man whose photographs appear in the duplicate record on file. But when the father of this applicant applied for a return certificate in Oct. 1912, at Boston and filed affidavits which referred to his 1899 records on file at the port of San Francisco inspector Lorenzon reported, Nov. 16, 1912, that 'the prior landing papers cannot be located.'

Apparently it was not until 1915 that the 1899 landing records again came to light. In the meantime the second alleged Lee Hing returned from China (1913) and was immediately landed. No statement was taken from him except the brief form statement on the boat. Four days after his arrival he was in possession of a certificate of identity. The extreme haste in disposing of his case, both at the time of his departure and return, even smacks of suspicion. He left his old haunts, and after considerable effort on the part of the immigration officials in 1915 he was located in San Angelo, Texas, in the interior of the state and away from the main lines of travel. Previous to this time he had never testified concerning his status except in a

very brief and perfunctory sort of way, but in 1915 he was examined at considerable length by inspector Munster at El Paso, Texas, and we believe that this examination shows conclusively that he is an imposter. We need not review this evidence but if the department desires to pursue the matter further we call attention to the report of inspector Munster dated Jan. 5, 1915 (S. F. file 12020/1481).

Both of the claimants to the 1899 record were arrested on departmental warrants in 1915 and after taking considerable testimony and an exhaustive investigation, the Assistant Secretary of Labor Aug. 3, 1916, ordered both warrants canceled, stating: 'I regard the claim of both men as doubtful, but am not satisfied as to whether he is in the United States in violation of law'. We believe if the matters herein pointed out had been called to the attention of the Asst. Secretary at that time, he would have been satisfied beyond any reasonable doubt that the father of this applicant was the rightful claimant to the 1899 landing record.

The principal contention raised against his claim to the 1899 record was based upon a comparison of his photograph with the photographs on the 1899 affidavits of which enlarged copies were made and filed in the case. It is well known that comparison of photographs taken at different times with many years elapsing, and some of them years ago when photographs could scarcely be called a likeness of the person they were supposed to represent, furnish no infallible proof in determining the question of identity, and absolute reliance cannot be placed on such comparisons. It has often come to our notice that Chinese persons have considerable difficulty in identifying old photographs of themselves even where there is no dispute as to the identity.

The photograph on the 1899 affidavit may be that of the father of this applicant but from what happened to this 1899 record, as hereinbefore pointed out, it is a justifiable suspicion that the photographs may have been changed. Of course, a person engaged in a matter of this kind would spare no effort to make the document appear genuine and above suspicion and it would be difficult to detect, but at least two of the photographs in the 1899 record show indications that they may have been tampered with. The paper around the photographs is somewhat wrinkled and smeared up in an unusual way. This suspicion is further strengthened by the fact that an inspector in 1906 identified the photographs on the 1899 record as that of the father of this applicant, although we fail to note any particular resemblance between his later photographs and the ones now appearing on said affidavit.

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**Point of Law.**

It is not disputed that the father of this applicant was admitted as a native born citizen of the United States in 1906. His status was adjudicated at that time. His status as a native was again adjudicated in 1912 when a return certificate was issued to him, and he was admitted as a citizen on his return to this country in 1915. Thereafter, in 1915, it developed that there were two claimants to the same landing record of 1899, the father of this applicant being one of them. Both claimants to this record were arrested on departmental warrants and after an exhaustive investigation. the Asst. Secretary of Labor August 3, 1916, canceled the warrants and in so doing stated

that he was not satisfied that either of the claimants were in the United States in violation of law. Thereafter, and on the 7th day of Sept. 1916, there was issued to the father of this applicant a certificate of identity No. 23775 showing that he was admitted as a native. This certificate among other things, sets forth that 'This is to certify that the person named and described on the reverse side hereof has been legally admitted to the United States as of the status indicated, whereof satisfactory proof has been submitted'.

This certificate stands as the last official action of the Department of Labor defining the status of the father of this applicant. It was issued shortly after the completion of an exhaustive investigation of his status and with full knowledge of all the facts charged against him. No new evidence has been offered to show that the decision then made was erroneous, and nothing has since developed to change his status. According to the solemn adjudication of the Department of Labor he is a citizen of the United States. So long as the father of this applicant is permitted to remain in the United States of the adjudicated status of a citizen, the executive officers of the government have no lawful power or authority to deny his children admission. The father of this applicant is either a citizen or he is not a citizen. He cannot be half native born citizen and half alien. He cannot be a native born citizen so far as his own personal status is concerned and an alien so far as his children are concerned. So far as the ajudications of the department are concerned he is a citizen and the executive officers of the government have no further jurisdiction to adjudicate his status, or review the former decision. That decision is final and binding upon the department until it

is reversed and set aside through judicial proceedings as provided by law. (Ng Fung Ho et al. v. White, 259 U. S. 276, decided May 29, 1922).

If the executive officers believe that the decision holding the father of this applicant to be a citizen is erroneous, the statute provides a remedy for proceeding against him. Where such valuable rights as citizenship are involved the matter should be approached in a fair and orderly manner and in strict conformity with law. The board of special inquiry appears to have proceeded on the erroneous theory that it is the duty of this applicant to establish anew and to their satisfaction that his father is a citizen, when under the conditions existing in this case, the burden is upon the government to overcome the prior adjudication and certificate of identity by evidence which the court considers competent. No such evidence nor any new evidence has been offered by the government. (Wong Yee Toon v. Stump, 147 C. C. A. 200-233 Fed. 194; Ng Fung Ho et al v. White C. C. A. 266 Fed. 765; Moy Nom 249 Fed. 772.)

Apparently, the immigration officials seek to shift that burden not onto the person whose citizenship is directly in issue, but onto a third person who would not even be a party to a proper and lawful proceeding to determine that question, and require him to establish in a collateral proceeding a fact which the department has already adjudicated in his favor and which, if still in doubt, should be determined through a direct, judicial proceeding instituted by the government against the party whose citizenship is questioned. Certainly the executive officers of the government would not be free from criticism if they were to assume the power to exclude this applicant through

and on failure to properly execute the law. The citizenship of this applicant is not in question. He is a minor, coming to his father in this country and the relationship is not disputed. His citizenship is fixed by statute to be that of his father. Of course, we are not here dealing with the citizenship of an applicant whose father has no adjudicated status and who is without the jurisdiction of the United States and cannot be proceeded against judicially.

The executive officers doubtless fully realize that it would be futile upon the facts appearing in the record, the prior adjudication, certificate of identity, and the statement of the Assistant Secretary of Labor that he was not satisfied that this man is in the United States in violation of law, to institute judicial proceedings against him, and the situation would be no more favorable to the government, if this appeal were dismissed and the applicant forced to resort to habeas corpus proceedings."

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**Argument.**

The decision of the lower court states, first, that there was no unfairness in the hearing accorded the applicant for the reason that the record disclosed a serious discrepancy sufficient to raise a conflict in the evidence and that the question of fact involved was essentially one for the determination of the board of special inquiry and this prevented a review of the case by the court, and, secondly, that the applicant was not entitled to have his claim to citizenship determined by a

judicial trial because he was in legal contemplation without our borders seeking to get in as distinguished from one lawfully within our borders defending his legal right to remain, citing cases White v. Chan Wy Sheung, 270 Fed. 764; Chin Yow v. U. S., 208 U. S. 8; U. S. v. Ju Toy, 198 U. S. 253; Tang Tun v. Edsell, 223 U. S. 673; and Ng Fung Ho v. White, 259 U. S. 276.

The discrepancy referred to relates to a photograph appearing on pages 5 and 10 of Exhibit "C" with that of the father of the applicant appearing on page 26, Exhibit "B". It is not contended that the applicant has been denied an opportunity to fully present his evidence but it is claimed that the evidence has not been fairly and impartially considered and for that reason a fair trial has been denied the applicant, and it was an abuse of discretion to deny him entry. This is forcibly illustrated by the fact that the denial is based solely on the question of a difference in photographs. The record and the photographs in question were before the Secretary of Labor in 1916 and he then stated that he could not say that the father of the applicant was in the country unlawfully. There is no doubt that he had in mind at that time the knowledge that many photographs in the Chinese records reposing in the files at Angel Island were changed surreptitiously and unlawfully by venal clerks working in conjunction with attorneys practicing before the

Department. At the investigation held at Angel Island in the years 1915 and 1916 it was disclosed that many photographs had been changed on the records and resulted in the return of indictments, prosecutions, and convictions for this violation of the law. This is a fact of public record. Not only were photographs changed on the records on file at the Angel Island immigration station, but they were also changed on the records on file in the office of the Clerk in the United States District Court. In a recent case tried in the United States District Court for the Northern District of California, First Division, No. 17657, Lee Foo and Lee Wing, it was proven conclusively that the photograph of the original claimant of the record was abstracted and a new photograph substituted therefor. The claimant of the record in that instance proved that he was the man referred to in the record and that there had been a substitution of photographs. Certainly, photographs are not the best evidence of the ownership of the record. There are many ways in which a photograph might become detached, lost or changed.

This point was recently discussed in the case of Ex Parte Chin Yoke Hing decided June 29, 1923, No. 2396, District Court D. Massachusetts, Weekly Advance Sheets, Federal Reporter, October 11, 1923, Vol. 291, No. 1, pages 274-277, the decision being in part as follows:

> "Brewster, District Judge. Chin Yoke Hing has applied for admission as the son of

Chin Bing Len, who claims to be an American citizen. The relationship between the applicant and his alleged father has been established to the satisfaction of the authorities, but the citizenship of the father is questioned.

In 1900 two brothers, Chin Yuck Suey and Chin Bing Len, were arrested at Malone, N. Y., charged with unlawful entry into the United States, and after a hearing before Commissioner Paddock they were adjudged to be citizens of the United States. They were discharged and the commissioner issued to each a certificate of judgment. There was evidence tending to show that a photograph of the defendant, named therein, was attached to each certificate by the commissioner when it was issued. The father presents the certificate issued to Chin Bing Len. From an inspection of it, it is obvious that the attached photograph has been placed on the document since it was issued and there are indications that the photograph has been substituted for another. * * *

I am of the opinion, therefore, that in this case, as in the earlier case of Chin Len the identity has been established by overwhelming and uncontradicted evidence, and that the excluding decision has no tangible basis on which to rest, and is therefore without authority of law. The fact that another photograph has been attached since the trial in 1900 would not necessarily be fatal. The original photograph may have become accidentally detached and another substituted in its place several years ago, in which case the testimony of Chin Bing Len would not be sufficiently wide of the mark to wholly discredit his evidence. The discrepancies in his statements can readily be accounted for by his condition at the time of the hearing. It does not seem to me that the presumption to which

> Chin Bing Len is entitled under the decision above cited has been overcome by the inference which the department has seen fit to draw from these discrepancies. The petition for a writ of habeas corpus should be allowed, and the writ may issue."

In the case of Lee Foo and Lee Wing, supra, it developed from the evidence adduced that a substitution of photographs had been made. If, however, the applicants had been denied a hearing on the question of their father's citizenship they would have lost the valuable right that attaches to American citizenship.

It is very significant that when the father of this applicant applied for a return certificate in 1912 and filed affidavits with respect to his 1899 record, the inspector in charge at Angel Island stated that the "prior landing papers cannot be located". It is quite evident that these papers were removed from Angel Island. It was developed at the trial of the defendants charged with mutilation of public records at Angel Island that they would take the record from Angel Island to some San Francisco office and there make the substitution of pictures or whatever changes they desired in the records and later return the record to Angel Island. This was evidently done with the record in this case.

It is further very significant that the inspector who examined the father of the applicant on his

return from China May 31, 1906, stated as follows:

> "I have compared the enclosed photograph with that on file in his previous landing and find them to be one and the same person,"

which clearly indicates that the record had been tampered with at some time subsequent to May, 1906.

In addition to that is the positive statement of a reputable lawyer, Henry C. Dibble, who made an affidavit at the time of the father's departure in 1904, Exhibit "B", page 4, to the effect that the person in whose behalf it was made was the same Lee Hing who was #162 returning on the ss "Belgic" November, 1898, and who was the same person he represented at that time.

After the arrest of the father of this applicant and the other claimant of the record in the year 1915 and upon consideration of all the facts, the Secretary of Labor, the deciding authority, canceled both warrants of arrest and refused to issue warrants of deportation. After this order finally disposing of the matter by the Secretary of Labor, Lee Hing, the father of this petitioner, applied to the immigration authorities for the issuance of a certificate of identity, and certificate No. 23775 was issued to him on the 7th day of September, 1916. Under Rule 19 of the Departmental Regulations, the certificate is endorsed in part as follows:

> "This is to certify that the person named and described on the reverse side hereof, has been regularly admitted to the United States as of the status indicated, whereof satisfactory proof has been submitted * * *"

The concluding clause of Subdivision 5, Rule 19, is as follows:

> "* * * or if at any time it should develop that such certificate has been obtained by fraud, the certificate shall be taken up and forwarded to the Bureau of Immigration, with report of the circumstances, for decision whether it shall be canceled."

No fraud has since been discovered and the certificate remains uncanceled. The Bureau of Immigration sought to have redecided by the present Secretary of Labor the same issue, upon identically the same evidence, that had been considered and decided differently by a former encumbent of that office. At the time the former Secretary of Labor considered the issue, he had before him all the evidence, testimony, records and exhibits bearing upon the question, and as hereinabove stated, he canceled the warrant of arrest against this Lee Hing, the father of this applicant, holding that he was unable to conclude that he was illegally within the United States, or that his claim of citizenship was falsely or fraudulently asserted. The favorable decision of Louis F. Post, Assistant Secretary of Labor, was dated August 3, 1916, and is found on page 166 of the deportation file in Exhibit "A",

while the decision of Carl Robe White, the present Second Assistant Secretary of Labor, is found on page 46 of the admission file cantained in Exhibit "A". The statutory authority for the decisions in deportation cases and appeals in admission cases rests upon the Secretary of Labor; the Bureau of Immigration is one of the bureaus in the Department of Labor. On page 46 of their memorandum in the admission file, exhibit "A", they state:

> "On this point, however, the board's consideration and study of the evidence and exhibits would seem to confirm the prior expressed opinions of the Bureau of Immigration that the present alleged father has not shown to any reasonably convincing degree that he can be the original Lee Hing."

A similar situation was adjudicated last year in Massachusetts, in re Wong Toy, 278 Fed. 562. In that case the relationship of father and son was established, but the father was one of two rival claimants for the same prior landing habeas corpus record. The immigration authorities and the Secretary of labor decided adversely as to Wong Toy's father and denied his admission. The court held:

> "It seems clear that the weight of the evidence on the question of the father's citizenship is in his favor. This was sufficient to entitle the petitioner to a finding in his favor on the point. But the immigration tribunals apparently exacted a higher degree of proof, unwarranted in law, and on that account refused admission. The memorandum of the Asst. Commissioner General says:

'The very fact that experienced officers have reached different conclusions on the point at issue in the case, and that another party has already been admitted to the United States as being identical with the person represented by the photo on court record No. 9527 (the habeas corpus case), is evidence that there is substantial doubt as to the correctness of the claims now advanced by the present claimant. The burden of proof is by law placed upon the applicant, and it is manifest that it has not been sustained.'

In other words, the petitioner has been held to establish beyond "substantial doubt" that his father is a citizen. This was plain and fundamental error in law. It was sufficient if the necessary facts were established by a fair preponderance of the evidence.

Referring to a similar situation, the Supreme Court recently said: 'It is better that many Chinese immigrants should be improperly admitted than that one naturalized citizen of the United States should be permanently excluded from this country'. Kwock Jan Fat v. White, 253 U. S. 454, 40 Sup. Ct. 566, 64 L. Ed. 1010.

On the evidence before the immigration tribunals the right of the applicant to admission was established. An order will be entered that the writ issue, and upon the return of it, unless the respondent desires to present further evidence, an order will be entered that the petitioner be discharged."

That these prior adjudications and certificate should be given great weight has been repeatedly affirmed by court decisions. In the case of Liu Hop Fong v. U. S., 209 U. S. 453, the court said:

"certainly the certificate ought to be entitled to some weight".

In the case of U. S. v. Hom Lim, 214 Fed. 456, at page 463, the court said:

> "The decision of his right to enter was presumptively correct; and unless the United States shows persuasively to the contrary, the mere certificate of admission is sufficient."

In Ex Parte Wong Yee Toon, 227 Fed 247, at page 251, the court said:

> "Such a certificate imports at least prima facie verity. It cannot be treated as if it had never existed. Some evidence must be produced to justify the immigrant officials denying to it its usual and appropriate effect."

And in the same case upon appeal to the Circuit Court of Appeals, Wong Yee Toon v. Stemp, 233 Fed. 194, at page 196 the court said:

> "After the certificate is issued, it is our view that the burden is cast upon the government, in case a proceeding is instituted to attack it, to show by testimony which the law recognizes as evidence that it should be annulled before an order for deportation is warranted."

In the case of Lui Hip Chin v. Plummer, 238 Fed. 763, this court held:

> "But suspicion is not sufficient to justify deportation on the ground that admission was fraudulently obtained."

From the foregoing it will be seen that the Secretary of Labor, notwithstanding this alleged discrepancy, appearing in the record, issued to Lee Hing, father of this applicant, the certificate affirm-

ing his citizenship. The court below in its decision cites the case of Chan Wy Sheung, 270 Fed. 764, as applicable to the instant case. There is a marked distinction to be drawn from a consideration of both cases. The evidence on which Chan Wy Sheung was excluded was discovered after the admission of Chan Young, and his two sons, father and brothers, respectively, of Chan Wy Sheung. One item of that evidence was that on June 2, 1899, Chan Young, having just arrived from China, filed at Victoria, B. C., a statement and declaration for registration as a laborer, in which he stated that he was born at Ding Boy, Sun Woy District China, and that his age was twenty-five years. Another item was a certified copy of the application for a certificate of residence made at San Francisco by Chin Wong, grandfather of the appellee, on April 10, 1894. Chin Wong therein deposed that he arrived in the United States at the port of San Francisco in May, 1876, and his application was accompanied by the affidavit of Chin Jow, who also said that Chin Wong arrived in the United States in May, 1876. Upon this evidence the Board of Special Inquiry found that Chan Young could not have been born here in 1875, and that in fact he was born in China and obtained admission to the United States by fraud. This evidence did not come to light until the application of Chan Wy Sheung for admission to the United States, and upon this after-discovered evidence, he was denied admission; whereas, in the instant case there has been no newly discovered evi-

dence to alter the previous finding and the record stands the same as when the Secretary of Labor considered it in 1916. It must also be noted that at the time Chan Wy Sheung applied for admission and appealed to the courts for relief, his father, Chan Young, was dead, and the father could not be proceeded against nor could there have been any proper adjudication of the case in court other than on the record evidence. This is not the situation that obtains in this case. The father is within the jurisdiction of the court and is entitled in all justice to have a judicial determination of his case.

The court also cites the case of Ng Fung Ho v. White, 259 U. S. 276. That was a proceeding which arose in this court and originally affected five Chinese, two of whom, Gin Sang Get and Gin Sang Mo, claimed American citizenship. Their plea was denied by this court, which decision under the same title being reported in 266 Fed. 769. These two boys had been landed as foreign-born sons of a native-born citizen through the immigration channels and by virtue of after-discovered evidence, the Department of Labor, on administrative proceedings, held that their original admission had been fraudulent and ordered them deported, notwithstanding they had been regularly admitted by the immigration authorities after full investigation and certificate of identity had been issued to them. This court held adversely to the appellants. Certiorari was applied for to the Supreme Court and it

was granted. After a full hearing the Supreme Court filed its decision herein referred to on May 29, 1922, the decision being in part as follows:

> "* * * Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact. The situation bears some resemblance to that which arises where one against whom proceedings are being taken under the military law denies that he is in the military service. It is well settled that in such a case a writ of habeas corpus will issue to determine the status. Ex Parte Reed, 100 U. S. 13; in re Grimley, 137 U. S. 147; in re Morrissey, 137 U. S. 157; Johnson v. Syre, 158 U. S. 109. Compare Ex Parte Crow Dog, 109 U. S. 556. If the jurisdiction of the Department of Labor may not be tested in the courts by means of the writ of habeas corpus, when the prisoner claims citizenship and makes a showing that his claim is not frivolous, then obviously deportation of a resident may follow upon a purely executive order whatever his race or place of birth. For where there is jurisdiction a finding of fact by the executive department is conclusive; United States v. Ju Toy, 198 U. S. 253; and courts have no power to interfere unless there was either denial of a fair hearing, Chin Yow v. United States, 208 U. S. 8, or the finding was not supported by evidence; American School of Magnetic Healing v. McAnnulty, 187 U. S., or there was an application of an erroneous rule of law, Gegiow v. Uhl, 239 U. S. 3. To deport one who so claims to be a citizen, obviously deprives him of liberty, as was pointed out in Chin Yow v. United States, 208 U. S. 8, 13. It may result also in loss of both property and life, or of all that makes life worth living. Against danger of such deprivation without the

> sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law. The difference in security of judicial over administrative action has been adverted to by this court. Compare United States v. Woo Jan, 245 U. S. 552, 556; White v. Chin Fong, 253 U. S. 90, 93.
>
> It follows that Gin Sang Get and Gin Sang Mo are entitled to a judicial determination of their claims that they are citizens of the United States, but it does not follow that they should be discharged. The practice indicated in Chin Yow v. United States, supra, and approved in Kwock Jan Fat v. White, 253 U. S. 454, 465, should be pursued. Therefore, as to Gin Sang Get and Gin Sang Mo, the judgment of the Circuit Court of Appeals is reversed and the cause remanded to the District Court for trial in that court of the question of citizenship and for further proceedings in conformity with this opinion. As to Ng Fung Ho and Ng Yuen Shew the judgment of the Circiut Court of Appeals is affirmed."

The court below in commenting upon this decision draws the distinction between a person who is within the borders of our country resisting an attack upon his right of citizenship and one who is theoretically without our borders seeking admission. Here, we have the situation of a father within the jurisdiction of the courts, presenting a claim of citizenship that is not frivolous but based upon a substantial claim, to-wit, a certificate issued by the Department of Labor affirming his citizenship, and the applicant who is conceded to be his natural son and as such is a citizen of the United States; yet that son

is denied entry because of the attack on the father's citizenship and the father denied the right to have his citizenship judicially determined. The father, according to the decision, has no remedy. Nine years have elapsed since he was given this certificate and no action was ever instituted against him or his claims. He cannot institute any proceeding himself as there is no way he can bring the matter into a court of the United States except by this method of Habeas Corpus. He is therefore in the position of one who bears the credentials of citizenship and yet deprived of his constitutional right to bring his children to his home, and the children are deprived of their citizenship. In the petition for the Writ of Habeas Corpus it is alleged that the immigration officers were influenced in their decision by the fact that the applicant is of the Chinese race. Can it be said this is not the truth? It would be hard to conceive of a white man being treated in the same manner. That the government recognizes the injustice of this situation is apparent from the decision rendered in the case and to be found on page 46 of the admission record attached to Exhibit A, which reads as follows (italics volunteered):

> "In the concluding paragraph of his brief, local counsel in effect challenges the Department to proceed judicially against the alleged father, stating that it is doubtless realized that it would be futile upon the facts appearing in the record, the prior affidavits, certificate of identity and the statement of the former Assistant Secretary of Labor that he was not satisfied that

> the alleged father in this case is in the United States in violation of law, to institute such action. The Board, in considering this reason and challenge, *feels that in justice to the Government and to the applicant,* the course referred to by counsel should be taken, and that the Commissioner at San Francisco should be directed to institute proceedings before a United States Commissioner or Court, charging an unlawful residence within the country. By this means, the question of his nativity will, of course, be finally and legally determined."

There are no separate findings or conclusions of the present Secretary of Labor in this case; all that he has done in the premises is to make the following endorsement at the bottom of the Bureau's memorandum:

> "so ordered: (signed) ROBE CARL WHITE, Second Assistant Secretary."

From the foregoing it is apparent that the Secretary admits that in justice to Lee Soo and his father as well as in justice to the Government, the issue of citizenship, in view of the circumstances in this case, should be decided in court. The recommendation concludes:

> "* * * The Board's final recommendation now, is that this appeal be dismissed, anticipating that the matter would then be thrown into court, and that also, the Commissioner at San Francisco be instructed to have a warrant sworn out for the alleged father before some United States Commissioner * * *."

It might be appropriate to here call attention to the case of Tsoi Sim v. United States, U. S. C. C. A. 9th Cir., May 5, 1902, 116 Fed. Rep. page 920, in which it was stated as follows:

> "One of the cardinal rules as to the interpretation of the statutes is that they should receive a sensible construction. 'All laws should receive a sensible construction'. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of law should prevail over the letter."

We submit that to avoid an absurdity, the decision of the lower court should be reversed with direction to issue the writ as prayed for so that this applicant may have a judicial trial as to his citizenship.

Dated, San Francisco,
November 7, 1923.

Respectfully submitted,

JOSEPH P. FALLON,

*Attorney for Appellant.*